ENVIRONMENTAL QUALITY

CHAPTER 58

MONTANA PETROLEUM TANK RELEASE COMPENSATION BOARD

Sub-Chapter 3

Substantive Rules

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Substantive Rules

17.58.301 GUIDELINES FOR PUBLIC PARTICIPATION (1) Pursuant to 2-3-103, MCA, the board declares that any interested person is encouraged to participate in its deliberations. The following policies will support this objective.

(2) The board shall maintain a mailing list for persons who wish to know when the board is meeting. Any person may add their name and address to this list by contacting the board.

(3) The board will mail a copy of its preliminary or tentative agenda to each person on the foregoing mailing list sufficiently in advance of each meeting.

(4) Upon specific request and payment of reasonable copying fees, the board shall send copies of board determinations, orders, and decisions to any person making such a request. (History: 2-3-103, MCA; IMP, 2-3-103, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, 1996 MAR p. 3125; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.302 CONDUCT OF BOARD MEETINGS (1) All meetings of the board, other than contested case hearings, shall be conducted by the presiding officer. In the absence of the presiding officer, the vice-presiding officer shall exercise the presiding officer's powers.

(2) The presiding officer may call any meeting of the board to order, pursuant to notice, when he or she determines that a quorum is present. A quorum is at least 4 members present, physically or by teleconference media.

(3) The presiding officer may impose time limits on the oral presentation of any person appearing before the board at any meeting other than a contested case hearing.

(4) The presiding officer may appoint a hearing examiner to conduct a contested case hearing within the agenda of a board meeting. A member of the board, including the presiding officer, may question a witness through and by leave of a hearing examiner so appointed. (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.303 OFFICERS; VOTING (1) The board shall elect a presiding officer and a vice-presiding officer for terms of 1 year each at its first meeting after October 1 of each year.

(2) Members shall vote on all motions in the order prescribed in Robert's Rules of Order.

(3) All votes must be personally cast, whether in person, by a teleconference medium, or by mail ballot if the presiding officer has, by unanimous consent, adopted a mail ballot procedure for all board members. No voting by proxy may be counted. (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96.)

Rules 17.58.304 through 17.58.310 reserved

17.58.311 DEFINITIONS Unless the context clearly indicates otherwise, the following definitions, in addition to those in 75-11-302, MCA, apply throughout this chapter:

(1) "Act" means Title 75, chapter 11, part 3, and 17-7-502, MCA.

(2) "Actually incurred", for purposes of reimbursing claims, means:

(a) invoiced charges for goods received or services performed in furtherance of a department-approved corrective action plan; or

(b) payments made to a third party in compensation for bodily injury or property damage caused by a release.

(3) "Automobile", for purposes of reimbursing claims, means a light vehicle as defined at 61-1-139, MCA.

(4) "Belonging to the federal government", with respect to determining eligibility of a petroleum storage tank, means:

(a) currently under the possession and control of a federal agency, or

(b) located on land held by a federal agency if the petroleum storage tank is operated by a contractor for the primary benefit of a federal agency. However, if the contract binds the operator to hold the federal agency harmless from liability for any release from the petroleum storage tank and the federal agency required its contractor to make this commitment prior to March 31, 1990, the petroleum storage tank is not considered as belonging to the federal government.

(5) "Board staff" means those employees of the petroleum tank release compensation board hired by the board pursuant to 75-11-318, MCA.

(6) "Bodily injury," as defined in 75-11-302, MCA, will be measured by the board to include detriment that is currently in existence or certain to occur in the future, based on competent evidence as opposed to conjecture or speculation.

(7) "Consumptive use" means any use which burns or otherwise consumes heating oil.

(8) "Consultant" means a professional person or organization of such persons who advise petroleum storage tank owners or operators with respect to planning and implementing corrective action.

(9) "Day" means a calendar day, including weekends and holidays. Whenever a period of days specified in the Act or this chapter ends on a day state offices are not open for business, the period ends on the next day state offices are open.

(10) "De minimis" means that amount of a hazardous substance, as defined in this rule, which when mixed with a petroleum product does not alter the detectability of the petroleum product, effectiveness of corrective action, or toxicity of the petroleum product to any significant degree.

(11) "Department" means the department of environmental quality.

(12) "Farm tank" as defined at ARM 17.56.101.

(13) "Hazardous substance" means:

(a) a substance that is defined as a hazardous substance by section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601(14), as amended;

(b) a substance identified by the administrator of the United States environmental protection agency as a hazardous substance pursuant to section 102 of CERCLA, 42 USC 9602, as amended; or

(c) a substance that is defined as a hazardous waste pursuant to section 1004(5) of the Resource Conservation and Recovery Act of 1976, 42 USC 6903(5), as amended, including a substance listed or identified in 40 CFR 261.

(14) "Necessarily incurred", for purposes of reimbursing claims, means:

(a) the work contemplated under a department-approved corrective action plan when that work addresses a release from a petroleum storage tank;

(b) the work not contemplated under an approved corrective action plan, but necessary to respond to an emergency in order to prevent greater damages; and

(c) in the case of third party damages, payment for damages that are a direct and proximate consequence of the release.

(15) "Property damage," as defined in 75-11-302, MCA, will be measured by the board in terms of diminution of market value, unless the cost of repairing damage is less than the diminution of market value.

(16) "Reasonably incurred", for purposes of reimbursing claims, means work required under an approved corrective action plan or necessary to respond to an emergency; or provide compensation to third parties for bodily injury or property damage caused by a release.

(17) "Residential tank" as defined at ARM 17.56.101.

(18) "Site/facility" means a complex of petroleum storage tanks under the same ownership on a contiguous piece of property.

(19) "Stored for noncommercial purposes", with respect to motor fuel, means any type of storage, except the following:

(a) storing for resale under license from the weights and measures bureau, department of commerce (82-15-105, MCA); or

(b) storing for later removal to another location where the fuel will be resold.

(20) "Subcontractor" is a person who performs billable labor in association with a corrective action at the release site when that person is under contract with the contractor/consultant. Subcontractor services do not include delivery or pickup services.

(21) "Tank" is a stationary device designed to contain an accumulation of petroleum or petroleum products and constructed of non-earthen materials (e.g., concrete, steel, plastic) that provide structural support.

(22) "Vendor" is a person who provides materials necessary for corrective action at the release site or services away from the release site. (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1990 MAR p. 1784, Eff. 9/14/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; AMD, 1993 MAR p. 2678, Eff. 11/11/93; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99; AMD, 2003 MAR p. 557, Eff. 1/17/03; AMD, 2004 MAR p. 3018, Eff. 12/17/04.)

17.58.312 ELIGIBILITY REQUIREMENTS (1) Except as otherwise provided in this rule, an owner or operator may be eligible for reimbursement of eligible costs incurred on or after April 13, 1989, as a result of an accidental release from a petroleum storage tank if the release was discovered on or after April 13, 1989.

(2) Unless otherwise provided under (3), an owner or operator of a farm tank or residential tank with a capacity of 1,100 gallons or less that is used for storing motor fuel for noncommercial purposes or a tank storing heating oil for consumptive use on the premises where it is stored may be eligible for reimbursement of eligible costs incurred after May 14, 1991, if the release was discovered on or after April 13, 1989.

(3) An owner or operator of a farm or residential tank listed below that was installed on or before April 27, 1995, is not eligible for reimbursement of otherwise eligible costs incurred after that date, unless the tank was voluntarily removed on or before December 31, 1995:

(a) a farm or residential tank with a capacity of 1,100 gallons or less used for storing motor fuel for noncommercial purposes;

(b) a farm or residential tank with a capacity of 1,100 gallons or less used for storing heating oil for consumptive use on the premises where it is stored; and

(c) a farm or residential underground pipe used to contain or to transport motor fuels for noncommercial purposes or heating oil for consumptive use on the premises where it is stored from an aboveground storage tank with a capacity of 1,100 gallons or less. (History: 75-11-318, MCA; IMP, 75-11-308, MCA; NEW, 1990 MAR p. 1784, Eff. 9/14/90; AMD, 1991 MAR p. 2263, Eff. 11/1/91; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.313 APPLICABLE CO-PAYMENTS FOR COMMINGLED PETROLEUM STORAGE TANK RELEASES (1) An owner or operator of a site with more than 1 release from separate petroleum storage tanks and whose plumes have commingled shall be reimbursed for eligible expenses as specified in 75-11-307(4)(b)(i), MCA. A person who seeks reimbursement from the fund at a rate different than that provided in 75-11-307(4)(b)(i), MCA, must prove that no leaking petroleum storage tank at the site is eligible under that section. (History: 75-11-318, MCA; IMP, 75-11-307, MCA, NEW, 1991 MAR p. 2036, Eff. 11/1/91; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

Rules 17.58.314 through 17.58.322 reserved

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17.58.323 VOLUNTARY REGISTRATION (1) An owner or operator may register a petroleum storage tank with the board for the purposes of determining potential eligibility of the petroleum storage tank for reimbursement under the petroleum tank release cleanup fund.

(2) An owner or operator may apply for such registration by submitting to the board a signed and otherwise completed application on a form provided by the board.

(3) The board may investigate and consult with other regulatory agencies concerning the information submitted in the forms to confirm the accuracy of the information submitted by the owner or operator. If a regulatory agency has information or the board discovers information that indicates the owner or operator submitted false or inaccurate information, the board may find that the owner or operator is ineligible for reimbursement.

(4) If a regulatory agency has reported non-compliance regarding the operation and management of the petroleum storage tank, the board may find that the owner or operator is ineligible for reimbursement.

(5) If the information on the form would, if true, establish potential eligibility and no inaccuracies have been discovered by or reported to the board, the board shall issue a statement to the owner or operator indicating potential eligibility for reimbursement.

(6) The board may delegate to the board staff the authority to issue determinations of eligibility for reimbursement when that determination is based on prior board decisions and similar material facts, subject to the owner or operator's right to be heard by the board. (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

Rule 17.58.324 reserved

17.58.325 ELIGIBILITY DETERMINATION (1) When a person notifies the department of a release from a petroleum storage tank, the board shall ensure the owner or operator receives the appropriate forms necessary for a determination of eligibility or to receive reimbursement from the board.

(2) Upon receipt of the completed eligibility form, the board shall determine eligibility by following the procedures under ARM 17.58.323(3) through (6). (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.326 APPLICABLE RULES GOVERNING THE OPERATION AND MANAGEMENT OF PETROLEUM STORAGE TANKS (1) The applicable state rules referenced in 75-11-308(1)(a)(ii) and (c), MCA, are:

(a) the following provisions of the National Fire Protection Association 1 Uniform Fire Code, (NFPA1/UFC) (2003), a copy of which may be obtained from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169, or online without cost at www.nfpa.org:

(i) Section 42.2.3.4.4.3, which states that means must be provided to sound an audible alarm when the liquid level in the tank reaches 90% capacity. Means must be provided either to automatically stop the flow of liquid into the tank when the liquid level in the tank reaches 98% capacity, or to restrict the flow of liquid into the tank to a maximum flow rate of 2.5 gpm when the liquid in the tank reaches 95% of capacity;

(ii) Section 42.2.3.4.5.2, which states that guard posts or other approved means must be provided to protect tanks that are subject to vehicular damage;

(iii) Section 42.2.4.2.1, which states that the design, fabrication, assembly, test and inspection of the piping system must meet the requirement of chapter 5 of NFPA1/UFC 30, Flammable and Combustible Liquids Code;

(iv) Section 42.2.4.2.3, which states that any portion of a piping system that is in contact with the soil must be protected from corrosion in accordance with good engineering practice;

(v) Section 42.2.5.3.4, which states that dispensing devices must be mounted on a concrete island or must otherwise be protected against collision damage by means acceptable to the authority having jurisdiction. Dispensing devices must be bolted securely in place;

(vi) Section 42.2.5.5.2, which states that a listed emergency breakaway device designed to retain liquid on both sides of the breakaway point must be installed on each hose dispensing Class I liquids. Such devices must be installed and maintained in accordance with the manufacturers' instructions;

(vii) Section 42.2.5.7, which states that fuel dispensing systems must be provided with one or more clearly identified emergency shutoff devices or electrical disconnects;

(viii) Section 66.2.2.1, which states that tanks may be of any shape, size, or type consistent with sound engineering design. Metal tanks must be welded, riveted and caulked, or bolted, or constructed using a combination of these methods; and

(ix) Section 66.2.3.1.1, which states that tanks must rest on the ground or on foundations made of concrete, masonry, piling or steel. Tank foundations must be designed to minimize the possibility of uneven settling of the tank and to minimize corrosion in any part of the tank resting on the foundation.

(b) the following requirements in ARM Title 17, chapter 56:

(i) the installation and design standards for underground storage systems contained in subchapters 1 and 2;

(ii) the spill and overfill prevention and corrosion protection requirements for underground storage tanks contained in subchapter 3;

(iii) the release prevention and detection requirements for underground storage tanks and piping contained in subchapter 4;

(iv) the testing, monitoring and recordkeeping requirements identified in (1)(b)(ii) and (iii);

(v) the release reporting, initial response and corrective action requirements identified in subchapters 5 and 6; and

(vi) for inactive and permanently closed underground storage tanks, ARM 17.56.701 and 17.56.702, to the extent that those rules require emptying of such tanks.

(2) An owner or operator shall be considered in compliance with the requirements of (1)(b)(i) through (iv), if the owner's underground storage tank, as defined in 75-11-503, MCA, has one of the following permits issued by the department in accordance with 75-11-509, MCA:

(a) a valid operating permit; or

(b) a valid conditional permit. (History: 75-11-318, 75-11-319, MCA; IMP, 75-11-308, MCA; NEW, 1998 MAR p. 479, Eff. 2/13/98; AMD, 1999 MAR p. 2279, Eff. 10/8/99; AMD, 2002 MAR p. 2904, Eff. 10/18/02; AMD, 2004 MAR p. 3018, Eff. 12/17/04.)

Rules 17.58.327 through 17.58.330 reserved

17.58.331 ASSENT TO AUDIT (1) Each contractor, subcontractor or vendor employed to carry out a corrective action plan in whole or in part shall assent to an audit of the documentation supporting their invoices if they charge at an hourly labor rate.

(2) The owner or operator shall obtain the assent on a form provided by the board. The form may be executed by the contractor, consultant, subcontractor, or vendor before or after the work is completed. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1998 MAR p. 3112, Eff. 11/20/98; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.332 INSURANCE COVERAGE; THIRD-PARTY LIABILITY; INVESTIGATION; DISCLOSURE; SUBROGATION; COORDINATION OF BENEFITS (1) Prior to receiving payment for any claim for reimbursement, an owner or operator who is determined to be eligible under 75-11-308, MCA shall thoroughly investigate the existence of any policy of insurance or other similar instrument which may indicate insurance coverage for some or all of the eligible costs arising from a release. At a minimum, this investigation must include:

(a) complete review of the present owner's and operator's records; and

(b) the insurance records of the owner or operator in the possession of the insurance agents or brokers; and

(c) where available, the records of prior owners or operators and others who may have information (if not policies) concerning insurance coverage.

(2) An owner or operator who has been determined to be eligible under 75-11-308, MCA shall investigate and provide the board with the identity of and basis for liability of any third party who through its acts or omissions is known or suspected by the owner or operator to be liable for the eligible costs arising from a release.

(3) If the board determines to aid in the investigation of available coverage, owners or operators must allow the board reasonable access to their records and, where possible, arrange access for the board to the records of others that may contain relevant insurance or third party liability information.

(4) Owners or operators seeking reimbursement for eligible costs shall disclose to the board, on a form provided by the board, when the first claim for reimbursement is submitted the results of the owner's or operator's investigations undertaken pursuant to (1) and (2). Together with the form, the owner or operator must provide copies of any policy of insurance, or any other evidence that may indicate insurance coverage for some or all of the eligible costs. Such evidence of insurance includes but is not limited to, cancelled checks from or to insurance companies, letters to and from insurance companies or declaration sheets indicating extent of coverage. Narrative information from previous owners or operators concerning possible coverage shall be submitted in writing along with the form. The disclosure must contain current information as of the date of the release as well as all available historic insurance information from the date of the facility's first use of petroleum storage tanks. Where applicable, this disclosure must also contain the identity of any third party who may be liable for the eligible costs sought to be reimbursed together with an explanation of the basis of liability and any supporting documentation indicating insurance coverage that third parties may have.

(5) To the extent the board may reimburse or has reimbursed owners or operators for eligible costs, the board has a subrogation claim against insurance carriers whose policies cover the reimbursed costs and against other third parties whose acts or omissions render them otherwise liable for the reimbursed costs. An owner or operator who accepts reimbursement for costs subrogates his rights to the board as against such insurance carriers and other third parties to the extent of the accepted reimbursed costs. An owner or operator, prior to receiving reimbursement of eligible costs, must agree on a form provided by the board, to subrogate its claims to the board to the extent of the accepted reimbursed costs.

(6) The board's obligation to reimburse eligible owners or operators does not include eligible costs owners or operators recover pursuant to contractual or tort-based obligations of insurers or other third parties. For the purposes of providing reimbursement or obtaining subrogation, the board is not an insurer.

(7) Reimbursement of claims by the board may be delayed by the board pending submission of any form referenced in this rule. If it appears to the board that a party has previously reimbursed an owner or operator for eligible costs, the board may withhold reimbursement of claims from that owner or operator pending a determination by the board of what eligible costs, if any, remain to be reimbursed. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99; AMD, 2001 MAR p. 660, Eff. 4/27/01.)

17.58.333 DESIGNATION OF REPRESENTATIVE (1) Owners or operators desiring to designate another person to receive reimbursement under the Act may do so by submitting the appropriate form provided by the board. (History: 75-11-318, MCA; IMP, 75-11-307, 75-11-307(3), MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1997 MAR p. 403, Eff. 2/25/97; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.334 APPLICATION FOR REIMBURSEMENT OF CLAIMS (1) Upon completion of any aspect of an approved corrective action plan, the owner or operator, or a remediation contractor acting on behalf of an owner or operator, may submit the claim to the board on a form provided by the board.

(2) If the claim is submitted by a person other than the owner or operator, the claim form must include a certification, verified by a notary public, that the individual signing the claim form is authorized to represent the owner or operator and that the statements in the claim form are true to the best of the signer's knowledge.

(3) Applications may be submitted in a piecemeal manner on the cleanup of a single release in situations where the cleanup would require a considerable period of time. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.335 APPLICATION FOR GUARANTEE OF REIMBURSEMENT OF FUTURE OR UNAPPROVED EXPENDITURES (1) Whenever an owner or operator requests the board to guarantee reimbursement for eligible costs not yet approved by the board, or estimated costs not yet incurred, the board will issue the requested guarantee, with no specific dollar amount, if it is able to make the necessary findings under (2) of this rule.

(2) The board must find, before guaranteeing reimbursement of future or unapproved expenditures, that the release, the petroleum storage tank, and the owner or operator are each eligible for reimbursement and that the expenditure or proposed expenditure would be of a type necessary in order to implement an approved corrective action plan or to pay eligible third-party damage claims.

(3) Application forms for guarantee of reimbursement are available upon request from the board. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1993 MAR p. 2678, Eff. 11/11/93; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.336 REVIEW AND DETERMINATION OF CLAIMS FOR REIMBURSEMENT (1) Claims for reimbursement may not be considered unless the owner or operator has submitted a completed application for eligibility.

(2) Upon receipt of a claim for reimbursement for corrective action costs the board staff shall determine if the claim form is complete. The board staff shall promptly advise the owner or operator, or a remediation contractor acting on behalf of an owner or operator, of any incompleteness or deficiency which appears on the claim form. The final review may be suspended pending the submission of additional information by the owner or operator, or a remediation contractor acting on behalf of an owner or operator.

(3) Claim forms that have been reviewed as complete at least 60 days prior to a scheduled board meeting will normally be considered by the board at that meeting. The reimbursement of claims for which authority to reimburse has been delegated under (4) of this rule, is not subject to this procedure. The agenda for consideration of claims at board meetings must follow the order in which claim forms were reviewed as complete and which are not reimbursed under (4) of this rule.

(4) The board may delegate to the director of the department of environmental quality authority to process and order reimbursement of specified categories of claims upon receipt and review. The director of the department of environmental quality shall report the number of such claims and the amounts obligated or expended at the next meeting of the board.

(5) The recommendations of the board staff shall be mailed to each board member and to the person submitting the claim at least seven days prior to a board meeting which is scheduled to consider the claim.

(6) The owner or operator may appear before the board and make a statement regarding the claim and the board staff's recommendations. Any other interested party may also make a statement. The board may establish a fair and reasonable limit on the time allowed for oral presentations. The board shall thereafter consider the claim and may grant it in whole, in such part as may to the board seem proper, or may deny the claim. Reasons for partial or total denials or disallowed expenses must be stated in the claim reimbursement summary contain in the file, and must be mailed to the owner or operator within 10 days of the board's decision. The minutes of a board meeting must reflect the sequence of actions taken on claims.

(7) Except as provided in (10), claims subject to the provisions of 75-11-308(3), MCA, must be paid pursuant to the following schedule:

Period of Noncompliance	Percent of allowed claim to be reimbursed
1 to 30 days	90%
31 to 60 days	75%
61 to 90 days	50%
91 to 180 days	25%
greater than 180 days	no reimbursement

(a) The period of noncompliance begins on the date of a violation letter that is sent by the department by certified mail to an owner or operator. The period of noncompliance ends on the date the department determines that all violations identified in the violation letter are corrected. The department shall indicate, by letter sent by certified mail to the owner or operator, the date that the violations were corrected.

(b) Reimbursement of claims submitted after issuance of a violation letter must be suspended until all violations are corrected as indicated by a certified letter from the department indicating compliance. After the owner or operator comes into compliance as indicated by the department, the board shall determine the appropriate rate of reimbursement at its next regularly scheduled meeting. Claims submitted prior to the issuance of a violation letter are not suspended and must be reimbursed or denied pursuant to (1) through (6).

(8) A violation letter is one that is issued by the department to an owner or operator who has failed to remain in compliance. The violation letter must be signed by a division administrator and indicate on it that it is a violation letter being issued pursuant to this rule. The violation letter shall notify the owner or operator of the specific statute(s) or rule(s) alleged to be violated and the action(s) to be taken that correct the violation(s). For purposes of determining the percentage reimbursed under (10) of this rule, the board may review the circumstances of the department's issuance of a violation letter, including those relating to whether a violation occurred, whether a violation was corrected, and when a violation was corrected.

(9) The provisions of (7), (8), (10) and (12) apply only when a release has been discovered and eligibility has been determined by the board, but the owner or operator fails to remain in compliance as required by 75-11-308(1)(e) and (1)(f), MCA.

(10) The percentages of reimbursement set forth in (7) may be adjusted by the board according to the procedures in (6) upon a showing by the owner or operator that one or more of the following factors applies and would entitle the owner or operator to an adjustment:

(a) the noncompliance has not presented a significant increased threat to public health or the environment;

(b) there has been no significant additional cost to the fund;

(c) the delay in compliance was caused by circumstances outside of the control of the owner or operator;

(d) there was an error in the issuance of the violation letter or in the determination of the date a violation was corrected or whether a violation has been corrected; or

(e) any other factor that would render use of the reimbursement schedule in (7) demonstrably unjust.

(11) An owner or operator dissatisfied with the denial or disallowance of all or any part of the claim may request a formal hearing. This request, with a specification of the grounds for disagreement with the board's decision, must be filed in writing with the board within 15 days of the receipt of the board's determination by the owner or operator. Upon receiving such request, the presiding officer of the board may appoint a hearing examiner to supervise any discovery and prehearing matters and to conduct the hearing, either at a subsequent meeting of the board or outside a board meeting, subject to 2-4-621, MCA, as the appointment may specify.

(12) With the exception of the timeframes set forth in (7) of this rule, any other time periods specified in this rule may be extended by agreement between the board and the owner or operator. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; AMD, 1993 MAR p. 2678, Eff. 11/11/93; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 1512, Eff. 7/2/99; AMD, 1999 MAR p. 2279, Eff. 10/8/99; AMD, 2001 MAR p. 2024, Eff. 10/12/01.)

17.58.337 THIRD-PARTY DAMAGES: PARTICIPATION IN ACTIONS AND REVIEW OF SETTLEMENTS (1) Any owner or operator who is sued for damages resulting from a release shall notify the board within one week of being served with a summons and complaint. The owner or operator shall also advise the board if any insurer is defending him, and the name of such insurer.

(2) Any owner or operator who, prior to litigation, enters into negotiations with a third party who claims to have been damaged by a release, or who receives a demand for payment of damages to a third party who claims to have been damaged by a release, shall notify the board of such demand or negotiations.

(3) The board may review the conduct of any such litigation or negotiation. The board will not assume any legal costs incurred by the defendant but may participate in discovery or trial proceedings or settlement negotiations which bear on the determination of a plaintiff's damages. If the parties wish to employ a judge pro tempore under the provisions of 3-5-113, MCA, and consult with the board in the selection process, the board will consider participating in the compensation of the judge pro tempore.

(4) The board may review any settlement negotiations for the purpose of determining the dollar amount of bodily injury or property damages actually, necessarily, and reasonably incurred by third parties which, if paid by the defendant, would be considered eligible costs. (History: 75-11-318, MCA; IMP, 75-11-309(1)(g), MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, 1996 MAR p. 3125; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.338 REVIEW OF CORRECTIVE ACTION PLAN IS REPEALED (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1991 MAR p. 2036, Eff. 11/1/91; AMD, 1995 MAR p. 118, Eff. 1/27/95; TRANS, from DHES, 1996 MAR p. 3125; REP, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.339 CORRECTIVE ACTION EXPENDITURES: DOCUMENTATION

(1) Charges claimed by the owner or operator pursuant to an approved corrective action plan must be documented as set forth in the instructions for the claim form. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; AMD, 1993 MAR p. 2678, Eff. 11/11/93; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.340 THIRD-PARTY DAMAGES: DOCUMENTATION (1) An owner or operator's payments for third-party damages pursuant to a judgment entered in a court shall include copies of the notice of entry of judgment, abstract of costs, and a declaration of the fees paid by the defendant to each attorney who appeared in the proceeding.

(2) An owner or operator's payments for third-party damages made by agreement in settlement of litigation shall include copies of the settlement agreement and such supporting documents as may be required under (4) of this rule.

(3) An owner or operator's payments for third-party damages made by agreement without reference to litigation shall include copies of the settlement agreement and such supporting documents as may be required under (4) of this rule.

(4) The board may require a third party claiming bodily injuries to be examined by a physician and the physician's report submitted to the board. The board may require a third party claiming property damage to allow a property appraiser or claims adjuster retained by the board to enter upon the property, inspect it, and report to the board. Such examinations are more likely to be required if the owner or operator has not kept the board apprised of the course of litigation or settlement negotiations as required under ARM 17.58.337. If the owner or operator does not keep the board apprised of the course of litigation or settlement negotiations as required under ARM 17.58.337, the board may refuse to reimburse any portion of a settlement or judgment under the actual, necessary and reasonable standards applied by the board to all expenditures.

(5) The board shall require a listing of amounts attributed to compensation for property damage, bodily injury, or any other aspect of damage resulting from a settlement or judgment. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1990 MAR p. 516, Eff. 3/16/90; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.341 CONSULTANT LABOR CODES, TITLES, AND DUTIES

(1) Claims for services provided by a consultant/contractor, or subcontractor, including services of its employees, must be categorized by labor code according to the list of codes maintained by the board. This requirement does not apply to any service provided by an individual that does not closely approximate one of the categories in the board's list.

(2) A consultant/contractor/subcontractor may file with the board, and amend, not more than once a year (unless further amendment is approved by the board staff), the rates at which it bills clients in Montana for the services described in the board's fee schedule list. Rate schedules and amendments must be maintained in confidence by and accessible only to the board staff, as the consultant's expectation of privacy is reasonable and outweighs the merits of public disclosure.

(3)(a) The board staff shall calculate the industry standard once a year after receipt of rate schedules from companies whose invoices the board frequently reviews and which have been filed in a number sufficient for a meaningful statistical analysis. In calculating the industry standard, the board staff shall compute a range of allowable rates for each code listed in the board's consultant/contractor code list, which will be the mean rate for each code plus the standard deviation, not to exceed 10% of that mean. The board staff shall then notify each filing firm whether its rates exceed the range of allowable rates, and if so, by how much. The amount by which a consultant's rate for a particular code exceeds the range of allowable rates will be presumed unreasonable.

(b) Board staff may request a detailed explanation of rate structures when a submitted rate appears to vary significantly from those submitted by other consultants/contractors/subcontractors for the same code. Board staff may refuse to use rates that significantly vary from similar rates submitted by others, rates from persons who have not submitted claims for reimbursement, rates from persons who have not submitted proper documentation for claim reimbursement, and other rates not deemed acceptable by the board.

(4) A consultant/contractor/subcontractor who has not filed its schedule of rates must submit its invoices for services formatted in accordance with (1) of this rule. Any rates which exceed the range of allowable rates will be presumed unreasonable.

(5) An owner or operator or consultant/contractor, or subcontractor may overcome the presumption that a rate is unreasonable by presenting evidence to the board as provided under ARM 17.58.336(6).

(6) Copies of the list, which establishes categories and codes of consultant/contractor/subcontractor services, may be obtained from the board. (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1993 MAR p. 2678, Eff. 11/11/93; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)

17.58.342 OTHER CHARGES ALLOWED OR DISALLOWED (1) The following types of charges are presumed eligible for reimbursement:

(a) long distance telephone charges specific to the project;

(b) computer usage for generating graphics, maps, well logs, etc., that are necessary for reports;

(c) supplies and materials directly associated with the project (e.g., equipment purchased or withdrawn from inventory specifically for the corrective action, laboratory analysis, or well supplies);

(d) copies and facsimiles, not to exceed the pre-approved rate, unless documentation supports a higher charge paid to an outside entity;

(e) mileage, at a rate equal to $0.05 per mile above the high rate for mileage reimbursement prescribed in the Montana Operation Manual (MOM), Volume I, Chapter 1-0300, Policy No. 1-0310.10 (August 13, 2002);

(f) lodging at actual cost unless excessive. Documentation supporting the cost (lodging invoice) is required;

(g) meals at the rates set forth in 2-18-501, MCA, for state employees traveling within Montana. Computation of time for purposes of determining meal allowances must be made according to 2-18-502, MCA. Exceptions for higher actual costs may be made by showing that seasonal or other factors make meals available at the above listed rates in certain limited areas (receipts will be required);

(h) vendor charges at cost;

(i) subcontractor charges at cost, unless a markup is allowed under (3)(c) of this rule;

(j) sampling fees at $10 per sample, which includes bottle, ice, cooler, packing, and office-related handling charges.

(2) The following list indicates, by way of example and not limitation, types of charges that are presumed not eligible for reimbursement:

(a) miscellaneous office postage;

(b) preparation of billing information and invoices;

(c) computer charges for writing reports;

(d) administrative charges for handling payments;

(e) standard office supplies;

(f) markups, add-ons, or profit added to vendor or subcontractor invoices, except as allowed under (3)(c) of this rule;

(g) charges for basic telephone service;

(h) interest;

(i) multi-tiered markups;

(j) markups by a person who serves the sole function of providing funding for a corrective action; and

(k) charges incurred prior to release discovery date.

(3) The following may be eligible for reimbursement, only if approved by the board staff prior to claim submission:

(a) rates for labor categories not listed in the board's fee schedule list;

(b) trespass fees;

(c) markups, not to exceed 7%, on subcontractor invoices when the subcontractor is furnishing labor (and incidental goods or supplies) on a project as part of the cleanup. Proof of payment by the contractor to the subcontractor must be submitted prior to board approval or director approval, authorized under ARM 17.58.336(3). Subcontractor markup is allowed only when the subcontracted work was preapproved in a corrective action plan.

(4) The presumptions made in (1) and (2) may be overcome if specific circumstances warrant. (History: 75-11-318, MCA; IMP, 75-11-318, MCA; NEW, 1993 MAR p. 2678, Eff. 11/11/93; TRANS, from DHES, and AMD, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1997 MAR p. 2198, Eff. 12/2/97; AMD, 1999 MAR p. 1512, Eff. 7/2/99; AMD, 1999 MAR p. 2279, Eff. 10/8/99; AMD, 2003 MAR p. 11, Eff. 1/17/03.)

17.58.343 REVIEW AND DETERMINATION OF THIRD PARTY DAMAGE COSTS (1) All claims for reimbursement of third party damages must be filed with the board. Upon receipt of the claim, the board shall determine if the claim is complete. The board shall advise the owner or operator of any incompleteness or deficiency which appears on the claim. The final review may be suspended pending the submission of additional information by the owner or operator.

(2) The board may delegate to the director of the department of environmental quality authority to process and order reimbursement of specified categories of claims upon receipt and review. The director of the department of environmental quality shall report the number of such claims and the amounts obligated or expended at the next meeting of the board.

(3) The recommendations of the board staff must be mailed to each board member and to the owner or operator at least 7 days prior to the board meeting that is scheduled to consider the claim.

(4) The owner or operator may appear before the board and make a statement on the claim and on the recommendations. Any other interested party may also make a statement. The board may establish a fair and reasonable limit on the time allowed for oral presentations. The board shall thereafter proceed to consider the claim and may grant it in whole, in such part as may seem proper, or may deny the claim. Reasons for partial or total denial of disallowed expenses must be mailed to the owner or operator within 10 days of the board's decision. The minutes of the board meeting shall reflect the sequence of actions taken on claims.

(5) An owner or operator dissatisfied with the denial or disallowance of all or any part of the claim may request a formal hearing. This request, with a specification of the grounds for disagreement with the board's decision, must be filed in writing with the board within 15 days of the receipt of the board's determination by the owner or operator. Upon receiving such request, the presiding officer of the board may appoint a hearing examiner to supervise any discovery and prehearing matters and to conduct the hearing, either at a subsequent meeting of the board or outside a board meeting, subject to 2-4-621, MCA, as the appointment may specify.

(6) Any time periods specified in this rule may be extended by agreement between the board or its staff and the owner or operator. (History: 75-11-318, MCA; IMP, 75-11-309, MCA; NEW, 1996 MAR p. 3125, Eff. 12/6/96; AMD, 1999 MAR p. 1512, Eff. 7/2/99; AMD, 1999 MAR p. 2279, Eff. 10/8/99.)